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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 195.

NORTHWESTERN ELECTRIC COMPANY and AMERICAN POWER & LIGHT COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

Opinion Below.

The opinion of the court below, the Circuit Court of Appeals for the Ninth Circuit, is reported in 134 F. (2d) 740.

Jurisdiction.

The opinion of the court below was filed March 27, 1943 (R. 1230). Petition for rehearing was denied, and an order staying the court's mandate to and including July 24, 1943 was entered, on May 22, 1943. Petition for writ of certiorari was filed July 22, 1943 and was granted October 11, 1943.

The jurisdiction of this Court rests upon Section 313(b) of the Federal Power Act, 49 Stat. 860, 16 U. S. C. A. §825 and Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. §347(a).

Statute Involved.

The statute involved is the Federal Power Act (hereinafter called the "Act"), 49 Stat. 847, 16 U. S. C. A. §791a, *et seq.*, particularly Section 301(a) of the Act, 49 Stat. 854, 16 U. S. C. A. §825(a), which authorizes the Federal Power Commission (hereinafter called the "Commission") to prescribe a system of accounts for public utilities subject to the Act. Certain sections of the Act are printed in Appendix A hereto, pages 82 to 96, *infra*.

Provision for limited federal regulation of electric public utilities engaged in interstate commerce was added to the Federal Water Power Act of 1920 (relating to licensed water power projects) by Title II of the Public Utility Act of 1935. It declares, as a basis for the exercise of federal jurisdiction over public utilities, that the business of generating and transmitting electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is affected with a public interest, and that federal regulation thereof is necessary in the public interest, "such federal regulation, however, to extend only to those matters which are not subject to regulation by the States." It provides that the Commission shall have a limited jurisdiction over facilities for such transmission or sale of electric energy, but shall not have jurisdiction over facilities used for generation in local distribution or only for the transmission of electric energy in intrastate commerce (Section 201).

Section 301(a) of the Act requires every public utility to make and keep such accounts and other records as the Commission may "prescribe as necessary or appropriate for purposes of the administration of this Act" and authorizes the Commission to prescribe a system of accounts to be kept by licensees and public utilities and to determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited, subject to the proviso: "That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State."

Questions Presented.

The questions presented are:

I. Whether the Commission, by virtue of the authority to prescribe a system of accounts conferred upon it by Section 301(a) of the Act, is authorized not merely to require the maintenance of a separate set of accounts for its own information, but also to require both:

(a) that the general corporate and fundamental books of account of a public utility company be recast to conform to the Commission's system of accounts, and

(b) that all internal affairs of such a company, including its right to pay dividends, as well as contract and other rights between the company and its stockholders, or between its stockholders, be governed by that system of accounts and altered if (or when) necessary to conform thereto.

II. Whether the Commission may, in the circumstances of this case, direct the writing-off, as distinguished from

the mere segregation, of book values in excess of original cost, without consideration of actual and existing values in a public utility company's assets fully sufficient to support its book values.

III. Whether the method of write-off ordered by the Commission is invalid and the exercise of an unconstitutional power.

IV. Whether Section 301(a) of the Act, if it be construed to authorize the action taken by the Commission, is unconstitutional and void in that it violates the due process clause of Article V of the Amendments to the Constitution, contravenes Articles IX and X of the Amendments to the Constitution, and confers judicial powers upon the Commission in violation of Article III of the Constitution.

V. Whether the court below deprived the petitioners of their right to judicial review, provided for by Section 313(b) of the Act, and guaranteed by the due process clause of Article V of the Amendments to the Constitution:

(i) by refusing to pass upon petitioners' contention that the Commission was not authorized to order a write-of of book values in excess of original cost without giving consideration to proof of existing values offered by petitioners, and

(ii) by refusing to consider whether the Commission had arrogated judicial powers by determining, in effect, that the common stock of one of the petitioners was not legally paid up.

Statement of the Case.

The opinion of the court below was entered upon the review, pursuant to Section 313(b) of the Act, of an order of the Commission as to the books and accounts of North-

western Electric Company (hereinafter called "Northwestern"). This order requires Northwestern, after having reclassified its accounts in accordance with a new system prescribed by the Commission, to make annual charges to surplus equal to its net income, after allowance for preferred stock dividend requirements, until a total of $3,500,000 has been taken from its earnings available for the payment of common stock dividends and used to remove a corresponding amount from its book assets—in particular from what is called Account 107, "Electric Plant Adjustments" (R. 78). The $3,500,000 in question was required by the Commission to be placed in Account 107 on the theory that it represented a "write up". The order under review thus directs Northwestern to refrain from paying any further dividends upon its presently outstanding common stock until an amount of $3,500,000, equaling the par value of Northwestern's common stock, has been written off and the owner of such common stock has, by this process, been required to pay an additional $3,500,000 for it (R. 69, 1241).

Northwestern is a public utility company doing business in Washington and Oregon, its property comprising both electric and steam-heating facilities, the latter in the business district of Portland, Oregon. In the two principal communities served (Portland, Oregon and Vancouver, Washington), it operates its electric facilities in competition with a larger public utility company. All of its steam-heating facilities (which are not in any way subject to the Commission's jurisdiction) and the major portion of its electric facilities are devoted solely to intrastate uses (R. 37). It is subject to comprehensive regulation by the authorities of the States of Washington and Oregon as to accounting, rates, adequacy of service, contracts with affiliated interests and every other aspect of its business which concerns the general public.

As a subsidiary of American Power & Light Company (hereinafter called "American"), a registered holding company, Northwestern also is subject to the jurisdiction of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935, 49 Stat. 803, *et seq.*, 15 U. S. C. A. §79.

Northwestern was incorporated in January, 1911, in the State of Washington. From the beginning of investigations and surveys until early in 1912, funds to carry on the enterprise were provided entirely by the organizers, who were, in effect, the sole owners of Northwestern until 1915. In 1911 and 1912, the company issued to the organizers 100,000 shares of its $100 par value common stock. The organizers subsequently returned approximately 45,000 of these shares to the company, in effect as treasury stock, and they were reissued to purchasers of new securities as an inducement and part consideration for such purchases (R. 13-16, 255-258).

American is innocent purchaser of Northwestern stock.

American is a public utility holding company, registered as such under the Public Utility Holding Company Act of 1935. It owns 100,000 shares of the common stock, being all the common stock presently outstanding, and $2,520,000 principal amount of 4½% Debentures due 1959, being all the debentures presently outstanding, of Northwestern. The issuance of such debentures, as well as the issuance and sale of Northwestern's presently outstanding First Mortgage Bonds, was authorized by order of the Securities and Exchange Commission dated October 19, 1939.

American acquired approximately 98% of the common stock of Northwestern, then traded in on the San Francisco Stock Exchange, in February and March, 1925, and the

remainder was purchased from time to time thereafter, at a total cost of more than $5,000,000. These acquisitions were made from the public, at arm's-length, for value, and without knowledge of any facts indicating that the stock was not fully-paid. At the time (from January through March, 1925), the market price of said common stock on the San Francisco Stock Exchange ranged from 32½ to 47⅞ dollars per share (R. 926-7, 932, 968, 975, Exs. 87, 88).

In 1935, certain preferred stockholders of Northwestern brought an action in the State courts of Washington, on behalf of themselves and other stockholders and on behalf of Northwestern, contending that the company's common stock was issued without consideration and praying that it be cancelled or that the then holder, American, be required to pay its full par value to Northwestern. A final decree quieting American's title to such stock as fully-paid and non-assessable was entered, in August 1936, pursuant to a stipulation of the parties, approved by the court, which required the reduction of the par value of Northwestern's common stock from $100 per share to $35 per share, or, in the aggregate, from $10,000,000 to $3,500,000 (R. 970-1001, 1044-1051, Ex. 89). Northwestern immediately made application to the regulatory authorities of the States of Oregon and Washington for approval of the reduction of the stated value of its common stock to $3,500,000 upon the basis of a determination by the Board of Directors of Northwestern of *the then fair value* of its assets. The issuance of certificates for 100,000 shares of fully-paid and non-assessable common stock of the reduced par value of $35 per share, in exchange for the surrender of certificates for 100,000 shares of common stock of a par value of $100 each, was authorized and approved by such State regulatory authorities in September, 1936, and the fully-paid and non-assessable $35 par value common stock was so issued (R. 575-587, 869-895, 1053-1054, Exs. 63, 64, 82-84).

Northwestern has been successful enterprise.

The soundness of the conception of the organizers of Northwestern is demonstrated by its present position as a successful enterprise. Northwestern's average rates for electric service are among the lowest of the nation's investor-owned electric utilities; it is meeting its obligations in full; it has no preferred stock dividends in arrears; it has no bank loans, no short-term debt other than current accounts, no tax arrearages; and on December 31, 1939, it had on hand cash and other current assets of more than $1,600,000 (R. 774, Ex. No. 74, R. Vol. III). For the year ended May 31, 1940 (earnings figures for subsequent periods were rejected by the Commission as irrelevant and immaterial), Northwestern earned more than $220,000, or more than 6%, on its $3,500,000 present par value of outstanding common stock (R. 25).

System of Accounts prescribed by Commission.

In 1936, the Commission, acting under Section 301(a) of the Act, prescribed a system of accounts for licensees and public utility companies. This system of accounts follows generally the scheme of the system under consideration by this Court in *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232. It provides that the excess of the book cost of electric plant over the cost of property to the first person devoting it to public service shall be included in one of two adjustment accounts. These accounts are (1) Account 100.5, Electric Plant Acquisition Adjustments, designed to include the difference between the cost to the accounting utility of electric plant acquired as an operating unit or system and the original cost of such property, and (2) Account 107, Electric Plant Adjustments, designed to include the difference between the original cost

and the book cost of electric plant to the extent that such difference is not includible in Account 100.5.

In 1940, following a hearing (to which American was not a party) with respect to the reclassification of Northwestern's accounts, the Commission ordered Northwestern to reclassify its accounts by making various adjustments, including the transfer of $3,500,000 from its electric plant account to Account 107, Electric Plant Adjustments, on the theory that, under the Commission's system of accounts, no assets were received by Northwestern when its common stock was issued.

Apparently considering that a write-off of that amount must follow as a matter of course, the Commission further ordered that Northwestern *dispose* of said amount of $3,500,000 by annual charges to surplus equal to its net income after allowance for preferred stock dividend requirements[1] (R. 78, 1241).

Disposition not in issue at first hearing.

The order which called the original hearing before the Commission had only directed Northwestern to show cause why the Commission "should not find and determine by order that adjusting entries be made to bring the books of account in conformity with" a report prepared by the Commission's staff (R. 3). And that report had recommended that the amount of $3,500,000 here in question "be retained in Account 107, Electric Plant Adjustments, pending the submission to the Commission of a plan for its disposition" (R., Vol. III, Ex. 3, p. 29).

[1] The Commission's opinion stated: "This disposition, assuming adequate earnings, is the equivalent of obtaining ultimately from the holders of the common stock (the holding company) a consideration of $3,500,000 for the stock. Certainly dividends should not be paid on the Common Stock until it has the equivalent of a paid-in value." (R. 69).

Northwestern's application to the Commission for rehearing (R. 91-109) specifically urged that the question of disposition was outside of the scope of the Commission's order to show cause and the issues of the hearing and that the ordered disposition was without due process of law. The Commission's order on application for rehearing, dated January 21, 1941, directed that "a rehearing be held * * * for the purpose only of permitting the presentation of a plan of disposition of the amount of $3,500,000 * * *." Northwestern filed with the Commission an application asserting that it was "unable to determine from the provisions of said order of January 21, 1941, whether the Commission intended thereby to provide or did provide that the issues of such rehearing include all questions appropriately related to the retention in or disposition from said Account 107 of the amount of $3,500,000 and the manner and character of any disposition which may or should be ordered" (R. 122), but no clarifying or interpretative statement or order was issued by the Commission.

The petition to the court below for review of the original order of the Commission, in assignments of error IX-10, 11, 12, X and XI, fully pleaded the invalidity of the action of the Commission in ordering disposition of the $3,500,000 and urged that this portion of the order must be set aside (R. 115, 128, 131).

In brief and oral argument upon the review of its original order, the Commission contended that the issue of disposition was not before the court. And it was successful in its endeavor to avoid judicial consideration of the disposition question. In its opinion (R. 819) affirming the ordered reclassification of Northwestern's accounts, the lower court said: "With respect to the common-stock item, a rehearing of the Commission's order was granted but

not decided. Until decided there is no 'order' to review here. *Fed. Power Comm'n* v. *Edison Co.*, 304 U. S. 375, 383." Thus the question of disposition was excluded from consideration by the lower court upon the review of the Commission's original (reclassification) order.

Rehearing held on disposition issue.

The rehearing granted by the Commission on the issue of *disposition* was held March 3 and 4, 1941 while the appeal from the Commission's original, or *reclassification*, order was still pending. American had been permitted to intervene and first became a party to this proceeding at such rehearing.

The Commission Examiner who presided at such rehearing on the disposition issue rejected all evidence with respect to

> (a) the *value* of the properties and business of Northwestern as of the time when American, an innocent purchaser without notice of any infirmity, acquired Northwestern's common stock, and
>
> (b) the March, 1941, *present value* of the properties and business of Northwestern.

Commission's disposition order entered.

Oral argument was had before the Commission *en banc* on May 21, 1941. The Commission's order upon such rehearing, the review of which by the court below is here under consideration, was entered on April 14, 1942. It requires (R. 1173) that:

> "(A) Northwestern Electric Company make the following disposition of the amounts recorded in Account 107, Electric Plant Adjustments, as directed in this Commission's order of December 6, 1940:

For each year, commencing with the calendar year 1940, it shall credit Account 107, Electric Plant Adjustments, and charge Account 414, Miscellaneous Debits to Surplus, with a sum equal to its Net Income (Account 400, Credit Balance Transferred from Income Account) less its Preferred Stock Dividend appropriations for each such calendar year until the amount of $3,500,000 shall have been entirely extinguished;

(B) Northwestern Electric Company file with the Commission certified copies of the journal entry required by paragraph (A) above, on or before June 1, 1942, and on April 1 of each year thereafter, as required."

The Commission's intention to require that no further dividends be paid on Northwestern's common stock is indicated not only by the language of the Commission's opinion, "dividends should not be paid on the common stock," but also by the stays granted both by the Commission and the court below on condition that no such dividends be paid during the stay period (R. 1222).

Opinion of court below.

The opinion of the court below affirming the Commission's order is by Judge Haney, concurred in by Judge Garrecht, and there is a separate concurring opinion by Judge Healy. The majority opinion held, among other things, (a) that petitioners' arguments that the actual value of Northwestern's business had been ignored by the Commission were "not pertinent"; (b) that it [the lower court] had "previously held that petitioner was not deprived of the value of its property without due process of law", thus disposing of this issue as previously decided when it was raised on the second review, although it had been com-

pletely disregarded on the first review; and (c) that whether or not the Commission had made a judicial determination or had arrogated judicial powers, it [the Commission] "was authorized to do what it did, regardless of whether the effects mentioned by petitioner result," and that the "only argument which can be made is that such statute is void—a contention not made here." In these, as in other respects, the lower court's opinion seems both to misapprehend the scope and effect of its own first decision and the character of the Commission's disposition order and to misunderstand the very real significance of certain of our contentions. Judge Healy's separate opinion is critical of the majority opinion, but concurs in the result on the untenable ground that the disposition ordered by the Commission is supported by substantial evidence.

Specification of Errors.

It is respectfully suggested that the court below erred:

1. In holding that the Commission was authorized to enter the order of disposition without regard to its effects upon the general and fundamental books of account and corporate affairs of Northwestern and thus upon rights determined and determinable under State law;

2. In holding that the ordered disposition could be required without regard to existing values in Northwestern's assets sufficient fully to support its book values and security structure, particularly:

> (a) where the order is substantially equivalent to a judgment against American as the present owner of Northwestern's common stock upon an allegedly unpaid stock subscription of a predecessor owner, a judicial question which has already been deter-

mined to the contrary by the courts and under the law of the State of Washington;

(b) where the rights of American in the stock, as settled by Northwestern's reorganization in 1936 and by the judgment of a State court of competent jurisdiction, and the status of the stock as fully-paid, are determinable only by the law of the State of Washington; and

(c) where the method of write-off ordered requires, in effect, a corporate reorganization of Northwestern.

3. In holding that petitioners' contentions that the order is arbitrary, because it ignores Northwestern's large existing surplus and values present in Northwestern's properties, are not pertinent because they have no bearing on the "original cost" theory of the system of accounts;

4. In holding that the Commission's order as a whole is supported by substantial evidence;

5. In failing to pass upon the conflict in jurisdiction between the Commission and the Securities and Exchange Commission and in failing to hold that the write-off ordered by the Commission involves an unlawful assumption by the Commission of jurisdiction over the payment of dividends by Northwestern and over a corporate reorganization of Northwestern;

6. In holding that it would not consider petitioners' arguments that the Commission's disposition order had ignored actual values presently existing in Northwestern's business because it had approved the system of accounts on the first review; and

7. In holding that the Commission was authorized to do what it did, regardless of the effects pointed out by peti-

tioners, and that "the only argument which can be made" is that "the statute is void" and in failing to consider, in this connection, whether, to avoid a holding that the statute is void, such statute must be so construed as to withhold the authority claimed.

Summary of Argument.

Commission has greatly exceeded its statutory authority.

As affirmed by the court below, the Commission's disposition order goes far beyond the "ambit of [its] statutory authority" and "as applied to the facts before it and viewed in its entirety", produces a shockingly "arbitrary result". *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586.

The authority over the keeping of accounts conferred upon the Commission by Section 301(a), limited as it is by Section 201(a) and other provisions of the Act, patently does not empower it to require Northwestern irrevocably to surrender, to the obvious prejudice of its security holders, values which fully support its existing capital structure. Even if we accept the Commission's contention that, as a matter of original cost accounting, the $3,500,000 here under consideration is a "write-up", thus agreeing, for the purposes of argument, that when the common stock of Northwestern was originally issued thirty years ago "no electric plant was received in exchange" for it, the fact remains that such stock, during the pendency of these entire proceedings, has had, and now has, very substantial value.

The Commission's order substantially impairs the value of the common stock of Northwestern in the hands of American, an innocent purchaser for value. It directs

that American contribute to Northwestern the full par value of said stock and that no further dividends be paid upon said stock until, through the accumulation of Northwestern's earnings available for such dividends, this contribution has been made.

The court's opinion construes Section 301(a) of the Act (which confers upon the Commission such limited authority as it possesses) so broadly as to hold, in effect, that the Commission, through the instrumentality of mere accounting regulation, may exercise plenary power over the internal affairs of a locally regulated public utility company, assuming and arrogating what obviously are judicial functions and ousting both State commissions and State courts of jurisdiction or nullifying their judgments. This broad interpretation of the statute, conferring upon it a retrospective operation which could not have been intended by the Congress, is not in harmony with the concepts of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78, which holds that there is no separate Federal common law; for it is now well settled that except in matters governed by the Federal Constitution, or by a clear and constitutional grant of authority by the Congress, questions of substantive law are to be determined in accordance with State law.

Order goes beyond Commission's express and implied powers.

Northwestern is a Washington corporation and the courts of that State alone have jurisdiction to determine the propriety of the issuance of its capital stock or the adequacy of the consideration received therefor or to enforce payment of an unpaid stock subscription. The rights of American as the holder of the presently outstanding common stock of Northwestern, which is validly-issued, fully-paid and non-assessable, have already been determined by a court

of competent jurisdiction of the State of Washington. Neither Northwestern nor any of its security holders could successfully attack the fully-paid status of Northwestern's common stock in the hands of American, which was and is an innocent purchaser thereof for value. But the Commission's order, and the opinion of the court below, wholly disregard the rights and status of American as the purchaser, at arm's-length and for $5,021,799.33, of stock for which the Commission's order, if it is sustained, will require American to pay an additional $3,500,000.

Without justification as "necessary or appropriate for purposes of administration" of the Act (§301(a)), even as a matter of accounting regulation, the Commission's order goes beyond any authority which could conceivably have been conferred upon the Commission by the Congress, when it attempts to regulate the dividends of a subsidiary of a registered public utility holding company, effect the corporate reorganization of such a company, and alter rights *inter se* as between the holders of its securities. Certain of the powers sought to be arrogated by the Commission in this connection clearly are judicial in character, while others have been vested in State regulatory authorities or have been conferred upon the Securities and Exchange Commission by the Public Utility Holding Company Act of 1935, 15 U. S. C. A. §79 *et seq.*, but none of them has been granted to this Commission, whether expressly or by implication.

Petitioners are deprived of their property without due process.

The order will result directly in depriving Northwestern, and American and other holders of the securities of Northwestern, of its and their property without due

process of law, and in taking its and their property without just compensation. If the order is sustained, no dividends may be paid on Northwestern's common stock during the period of years (whatever may be its length) required to write off the $3,500,000 from Northwestern's plant account, and all of Northwestern's earnings for that period, which might otherwise be paid as dividends on such common stock, will be impounded, under duress, so that such earnings can *never* become available for dividend purposes. *Cf. Lynch* v. *United States*, 292 U. S. 571; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555; *Osborn* v. *Nicholson*, 13 Wall. 654.

The court below recognized that the market value of Northwestern's common stock will be impaired by the Commission's order, but sought to justify the resulting deprivation of property rights by reliance upon the clearly distinguishable decision of this Court in *Kansas City Southern R. Co.* v. *United States*, 231 U. S. 423, 455. The *Kansas City* case approves the exercise of a legitimate accounting function; the order here under consideration overleaps the scope and function of accounting and makes what obviously is a judicial determination.

Order is arbitrary, capricious, and wholly unsupported by evidence.

Even if the Commission's order were valid in other respects, it is arbitrary and capricious as to method in that, among other things, it ignores Northwestern's substantial existing surplus and prescribes an arbitrary "write-off" or amortization method for which there is no factual basis and which does violence to accounting principle and policy. The particular plan of "disposition" provided for is unsupported by accounting authority, by accounting testimony or by any other evidence whatever in the record of this pro-

ceeding. References were made by members of the Commission staff to the necessity for "disposing" in one way or another of amounts recorded in Account 107, Electric Plant Adjustments, but the arbitrary and punitive method of disposition ultimately adopted by the Commission was not even hinted at until it appeared in the Commission's original order.

All evidence as to value disregarded.

The Commission's order was entered without giving any consideration to competent evidence as to the value of the properties and business of Northwestern offered on behalf of both Northwestern and American. For whatever purpose the Commission's determination may have been made—for corporate reorganization, for the regulation of dividends, for the altering of rights *inter se* among security holders, or for rate-making—, its application of the *original cost* of tangible, physical properties only either as an end in itself, or as a single criterion of value, is not "within the ambit" of the Commission's statutory authority and patently is not an exercise of its limited statutory power "in a just and reasonable manner." *Gray* v. *Powell*, 314 U. S. 402; *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510.

Court below deprived petitioners of their right of judicial review.

Upon the first review (*i. e.*, the review of the Commission's order requiring Northwestern's accounts to be reclassified; 125 F. (2d) 882), the court below refused to pass upon the question of whether the Commission could order a write-off of the $3,500,000 here under scrutiny without considering values patently existing in the property of

Northwestern. But upon review of the disposition order now under consideration, the court below declined to pass upon this question, on the ground that it had been decided on the first review! Thus the Court disregarded this issue on the first review, but regarded it as previously decided when it was raised on the second review. In this respect, the court below clearly deprived petitioners of their right to judicial review provided for by Section 313(b) of the Act and guaranteed by the due process clause.

The court below also refused to consider whether the Commission had arrogated judicial powers by what is, in effect, its determination that the common stock of Northwestern was not legally paid for,—a question properly determinable only by the courts and under the law of Washington. The court said that the only argument which petitioners might have made in this connection is that "such statute is void—a contention not made here."

But, of course, argument as to the constitutionality of the statute was implicit in petitioners' contentions. They argued, both before the Commission and before the court below, that the Act does not empower the Commission to enter such an order of disposition, that the order would take the property of petitioners without due process of law, in violation of Article III of the Constitution and of the Fifth and Tenth Amendments, and that, therefore, the order was without authority of law. Thus the court below was urged so to construe Section 301(a) of the Act as to withhold from the Commission the judicial functions which it sought to arrogate and it clearly was the court's duty to adopt that construction in order to uphold the statute's validity. *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531; *Guaranty Trust Company of New York* v. *U. S.*, 304 U. S. 126. Again, on this issue, the court below denied petitioners their day in court.

ARGUMENT.

I.

As a matter of statutory construction, the Commission's order goes far beyond any authority conferred upon it by the Federal Power Act.

Such statutory authority for the order here under review as the Commission possesses is conferred upon it by Section 301(a) of the Act, as limited by Section 201(a) and other provisions of said Act. The Court below held (R. 1238):

> "The Commission was authorized to do what it did, regardless of whether the effects mentioned by petitioner result. The only argument which can be made is that such statute is void * * *."

In this, as in other respects, the court below was in error, for while the statute provides for limited Commission jurisdiction over the keeping of accounts by public utility companies, it does not, under any conceivable interpretation of its language, contemplate any such punitive and destructive order as that entered by the Commission in this proceeding.

Upon the first review in this matter, which was concerned only with questions of reclassification, the opinion of the court below said (R. 816-817):

> "The system of accounts takes nothing from petitioner. Petitioner may keep such other accounts as it desires. The present regulation only requires a particular system of accounts to be kept, not that other systems shall not be kept."

The Circuit Court of Appeals for the Seventh Circuit, in *Northern States Power Company* v. *Federal Power Commission*, 118 Fed. (2d) 141, and the Court of Appeals for the District of Columbia, in *Alabama Power Company* v. *Federal Power Commission*, 128 Fed. (2d) 280, also expressed the opinion that a company could keep more than one set of books. The decision of the court below on the second review, however, is directly in conflict with these holdings. The purpose of the Commission's order of disposition—to require the holder of Northwestern's common stock to make a $3,500,000 contribution to capital—would be frustrated, and the order itself would be denied any efficacy, unless the holding of the court below is that the order of disposition governs Northwestern's fundamental books of account and controls its financial transactions, such as the payment of dividends, *to the exclusion of any other plan or system or authority*. The lower court failed definitively to decide, as we believe this Court must decide, whether the Commission, or State authority, controls the fundamental books of account of Northwestern.

What the Commission's disposition order (together with its reclassification order) purports to determine is that the common stock of Northwestern was not issued for physical property or other tangible assets; that such common stock was not issued for promoters' services of "demonstrable value or any other consideration"; that, in effect, such common stock is not legally paid-up in the hands of American and that American must contribute to Northwestern the full par value of such common stock as presently outstanding. As the Commission said (R. 69): its disposition requirement "is the equivalent of obtaining ultimately from the holders of the common stock (the holding company) a consideration of $3,500,000 for the stock."

The opinion of the court below, in affirming the Commission's disposition order, construes Section 301(a) so

broadly as to hold, in effect, that the Commission, through the instrumentality of mere accounting, may exercise plenary power over the internal affairs of a locally regulated public utility company, whatever destructive effect such regulation may have upon the jurisdiction, and the judgments, of State courts. Such an elastic interpretation of Section 301(a) is without warrant in either the language or the legislative history of the Act.

That Congress did not intend to empower the Commission to eliminate, through its original cost accounting system, values supporting the capital structure of utility corporations and thereby impair or destroy the vested rights of the security holders of such corporations or the rights of such corporations to declare and pay dividends, is demonstrated by the legislative history of the Act (pp. 30-33, *infra*). Congressional intent is also made clear by examination of the purpose of the original Federal Water Power Act (June 10, 1920, C. 285; 41 Stat. 1063; 16 U. S. C. A. Secs. 791-823); and its construction and relationship to its successor, the present Act (August 26, 1935, C. 687; 41 Stat. 838; 16 U. S. C. A. Secs. 791-825).

Original Water Power Act protected existing rights.

With the advent of the large hydro-electric plants, Congress, pursuant to its exclusive jurisdiction over navigable streams and water-ways, enacted the Federal Water Power Act of 1920. Even a casual reading of this Act will demonstrate its purpose to protect navigable rivers and control licensees and projects constructed by them. Since Congress has paramount jurisdiction over such water-ways, it could arbitrarily impose such terms as seemed advisable for their use.

Quite properly, therefore, licenses under that Act could be issued only on condition that the licensee accept all the

terms and conditions of the Act, which must be expressed in the license agreement (Sec. 6). The licensee thus contracted to abide by the authority of the Commission "to prescribe rules and regulations for the establishment of a system of accounts and for the maintenance thereof" (Sec. 4(f)). Although this section did not specifically require the accounts to be maintained on any cost basis, the Commission was authorized "to require any licensee to make adequate provision for currently determining said costs and other facts". Quite naturally the Act imposed upon the licensee many other obligations, including the maintenance of amortization reserves out of surplus accumulated in excess of a reasonable rate of return, the maintenance of adequate depreciation reserves, and the regulation of service and rates in the absence of State regulation.

As applied to licensees, all such provisions were particularly appropriate and practical in view of the purposes and objectives of the legislation, since the Government proposed to grant prospective privileges in connection with water-ways over which it had always had paramount jurisdiction, and contracted for the expropriation of such licensed projects on a cost formula.

It is significant, however, that in all instances where the vested rights of a citizen were involved, the Act applied the fair value doctrine in determining the citizen's damage or the value of his property. It provided that if the licensed project were taken over at the expiration of the license, or before, by mutual agreement, it must be taken over on a basis of the net investment to the licensee, but significantly the Government was required to pay reasonable severance damages. The Government also reserved the right to take over the project by condemnation at any time, which, of course, would require payment of the fair value of the

licensee's property (Sec. 14). Provision was likewise made for the condemnation of necessary property by the licensee, which again required the application of the fair value doctrine in determining the citizen's compensation (Sec. 21). But Section 23 perhaps demonstrates more pointedly than any of the foregoing provisions the intent of Congress to protect the vested rights of a citizen and to compensate him for the fair value of his property, if the purposes of the Act required its expropriation. This section provided that the Act shall not affect "any permit or valid existing right-of-way heretofore granted" or "any authority heretofore given pursuant to law", but permitted any person holding or possessing such permit or right-of-way to apply for license under the Act. Upon issuance of such a license, the provisions of the Act applied to such applicant as licensee "*Provided*, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Act and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such determination, if license has not been issued." As a further protection of the citizen's vested rights, provision is made for a determination of "the amount of such fair value" by an appropriate District Court of the United States.

Furthermore, the historical and paramount right of the States to regulate the distribution and sale of power (including, among other things, nature and extent of service to be rendered, rates and issuance of securities) is recognized, even though the power may have entered interstate commerce (Secs. 19 and 20). Thus the essentially local character of the electric utility industry, including

the right to local regulation thereof, was recognized and protected.

By Title II of the Act of August 26, 1935 (49 Stat. 838), certain sections of the Federal Water Power Act were amended and, as so amended, Sections 1 to 29 thereof became Part I of the Federal Power Act. In so far as the matter under discussion is concerned, the amendments were immaterial. Furthermore it is submitted that Congress did not intend to change the fundamental character of the Federal Water Power Act by adding Parts II and III. Sections 14, 19, 20, 21 and 23, referred to in the foregoing paragraphs, were taken over bodily and essentially unchanged to become sections bearing the same numbers in the new Federal Power Act.

In Part II of the new Act, which purports to deal with the regulation of "public utilities", the local character of the electric utility industry and the desirability of maintaining State regulation unimpaired are given further emphasis by the proviso of Section 201 that Federal regulation shall "extend only to those matters which are not subject to regulation by the States." Furthermore, Sections 205 and 208, conferring upon the Commission its limited regulatory authority with respect to rates and the valuation of property, recognize the fair value doctrine both expressly and by implication.

Under Part III, the administrative portion of the Act, the Commission is authorized to prescribe a system of accounts for licensees and public utilities subject to its jurisdiction (Sec. 301(a)). No provision is made for either the form or the basis of such system of accounts. And certainly there can be no legitimate pretext for reading only a portion of Sec. 208(a) (conveniently ignoring Secs. 14, 19, 20, 21 and 23 and other provisions of the Act) into Sec. 301(a) to reach a conclusion requiring public utilities to

remove from their fundamental corporate accounting records book values which are fully supported by the present fair value of their assets.

This Court held in the case of *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, that public utilities subject to the jurisdiction of the Commission could neither sell nor acquire utility properties or securities without the consent of the Commission as provided in Section 203 of the Act, for the reason, among others, that Section 204 (which is the only section which purports to grant any power—and then only prospectively—to the Commission over the securities and capital structures of such utilities) had withdrawn "federal regulation from security issues where such issues are 'regulated by a State commission' ", whereas Section 203 contains no such restriction on the jurisdiction of the Commission.[2] This Court thereby quite properly recognized the "meticulous care" with which Congress undertook to protect the status of the securities of a non-licensee public utility and the rights of the security holders of such a public utility, fixed and vested under the statutes and judicial determinations of the States having jurisdiction, by expressly and specifically withdrawing the subject matter from the jurisdiction of the Commission. Such recognition of Congressional intent clearly precludes recognition of the Commission's attempt by indirection to arrogate such juris-

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[2] *Jersey Central Power & L. Co.* v. *Federal Power Commission*, 319 U. S. 61, 77. "More significant even than these indicia of the scope of the concluding words of Section 201(a) is the fact that the Committee which adopted the new concluding words adopted also Section 204, subsection (f), withdrawing federal regulation from security issues where such issues are 'regulated by a State Commission.' While, of course, this may have been done to make certain that state power would not be infringed, such meticulous care was entirely unnecessary, if the wording of Section 201(a), simultaneously added, had the effect now urged."

diction and destroy vested rights through an accounting system especially designed to accomplish such a result on the untenable theory that Section 301(a) authorizes the establishment of such a drastically regulatory system of accounts.

A licensee which has or may hereafter proceed with the development of a licensed project subject to the requirements of the Federal Water Power Act or the Federal Power Act may be required, *as a matter of contract* to maintain an accounting system which reflects actual original legitimate cost of such licensed project and may be required to write off any book values not covered by such definition of cost without imposing upon such licensee any illegal burden. On the other hand, to apply such an accounting system as a basis for ordering such write-offs or amortizations as are here involved to a non-licensee public utility which acquired its property and established its capital structure long before the passage of the Federal Water Power Act of 1920 is impractical, unfair and illegal. It results in impairing or taking vested rights acquired under valid State laws and rooted in the fair value of the utility's property, and, because it takes such property without paying the fair value thereof, violates the Fifth Amendment of the Constitution.

In considering the power of the Commission under the Act to write off or amortize such book values, the Federal Courts have generally recognized this vital distinction between non-licensed utilities and licensee utilities. In *Ala. Power Co.* v. *Fed. Power Comm.*, 128 Fed. (2d) 280, the Circuit Court of Appeals for the District of Columbia, considering the applicability of this Court's decision in the *American Tel. & Tel. Co.* v. *United States*, 299 U. S. 232, to licensees under the Federal Power Act, said (at pp. 292-293):

"It is very doubtful whether an analogy can properly be drawn between the present case and the Telephone Company case, or between the powers of the Communications Commission, when it acts to prescribe a system of accounting for the telephone companies, and the Power Commission when it acts with regard to the accounting systems of its licensees. The telephone companies are not licensees. The difference between their status and that of the radio broadcasting companies—which *are* licensees—is clearly drawn in the Communications Act. It is not necessary to determine, for the purposes of this decision, whether the rights of the Power Commission's licensees are as unsubstantial as those of the radio broadcasting companies. That they are by no means so substantial as those of the telephone companies and other carriers seems clear.

The powers of the Federal Power Commission over licensees, like those of the Federal Communications Commission over its licensed radio broadcasters, are 'comprehensive and inclusive.' Nor is the reason far to seek. In granting the privilege of exploiting the water resources of navigable streams, or the channels of radio communication, the Federal Government is making grants out of its exclusive domain. Aside from statute, there is no right to engage in such activity. The grant of such privileges may be made subject to conditions appropriate to safeguard the interest of the public. Having received its license subject to such conditions, and enjoying such privileges as it does, subject to the severe limitations imposed by the statute, the Company cannot shuck off its obligations as a licensee and set itself up in another capacity, or avoid the comprehensive and inclusive powers of the Commission.

The attempted analogy is, apparently, based upon a misconception of the different formulae prescribed by the Water Power Act for valuation of the properties of (1) licensees of the Federal Power Commis-

sion and (2) other public utilities subject to its control; as well as a misconception of the different formulae prescribed by the Communications Act. In making valuations of the property of common carriers—as distinguished from its radio broadcasting licensees—the Communications Commission is governed by entirely different provisions of the statute and is required to give consideration to other elements of value than those of original cost. And the Power Commission, in making valuations for purposes of rate regulation of public utilities—not its licensees—is governed, also, by a different formula than when it makes valuations of the property of a licensee." * * * "In the present case, therefore, the Commission observed the formula prescribed by the statute and valued the properties of its licensee at 'actual legitimate original cost.' It was not required to consider other elements of value in doing so, as it might have been if it had been engaged in a valuation of the properties of public utilities which are subject to its control under Part II of the Act; and as the Communications Commission was required to do in prescribing the system of accounts which was challenged in the Telephone case."

In *Louisville Gas & Electric Co.* v. *Federal Power Commission*, 129 Fed. (2d) 126, the Circuit Court of Appeals for the Sixth Circuit said (at pp. 132, 134):

"Since Kentucky has a commission which regulates rates and services, it may be conceded that the Federal Power Commission has no present authority in this respect. It does not, however, follow that the Commission is without jurisdiction to regulate and control the petitioner's system of accounts and to require it to make effective its finding of actual original cost or net investment. The petitioner, in respect to Project 289, is a licensee of the government. Questions of value, for purposes of amortiza-

tion, recapture, or taking over, are not those which apply for rate-making purposes to utilities stemming from private investment in pre-regulatory periods or to those initiated by private enterprise without contribution of necessarily vital power by government conditioned upon compliance with the terms of the grant." • • •

(p. 134) "Clearly, the required charge to surplus is in no sense a confiscation of the petitioner's property when we keep in mind that what is involved is a licensed project not only subject to accepted conditions of amortization, recapture, or taking over, but subject also to revocation of the license if certain of its conditions are not complied with." • • •

See also:

Northern States Power Co. v. *Federal Power Commission,* 118 Fed. (2d) 141, 144.

The consequences of attempting to apply the disposition requirements of the Commission's system of accounts to a non-licensee public utility certainly could never have been intended by a Congress which so painstakingly attempted to protect the vested rights of the citizen and the fair value of his property, as is demonstrated by the following discussion of the proceedings in Congress during the pendency of the Federal Power Act and the foregoing analysis of the original Federal Water Power Act and its relationship to the Federal Power Act.

Legislative history of present Act discloses Congressional intent.

The Report of the Senate Committee on Interstate Commerce upon the bill (S. 2796) which was enacted into law as the present Federal Power Act said:[3]

[3] Senate Report No. 621, 74th Cong., 1st Sess., page 48.

> "Section 201—Subsection (a) contains a declaration of the necessity for Federal regulation and defines the scope of that regulation. * * * It also declares the policy of Congress to extend that regulation *to those matters which cannot be regulated by the States* and to assist the States in the exercise of their regulatory powers, *but not to impair or diminish the powers of any State commission.* [Italics supplied.]

Notwithstanding this statement in the Senate Committee's report, the House, apparently not satisfied that State power had been adequately protected, struck out the entire Senate bill by amendment and substituted a new draft. In presenting the amended bill to the House, its Committee reported:[4]

> "The new Parts (II and III) are designed to meet the situation which has been created by the recent rapid growth of electric utilities along interstate lines. * * * Under the decision of the Supreme Court of the United States in Public Utilities Commission *v.* Attleboro Steam & Electric Co., 273 U. S. 83, 71 L. ed. 549, 47 S. Ct. 294, the rates charged in interstate wholesale transmission may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates. A 'wholesale' transaction is defined to mean the sale of electric energy for resale and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce.
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> "Part II gives control over security issues of interstate operating companies in cases where no State commission has control and over the consolidation, purchase, and sale of interstate operating properties. * * *

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[4] House Report No. 1318, 74th Cong., 1st Sess., page 7.

> "*The bill takes no authority from State commissions* and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. * * * *Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.*" [Italics supplied.]

In Conference Committee, Sec. 201 took its present form, which is the language of the House bill in all material particulars. Since the Congress was so intent on preserving the responsibilities of the State commissions, *a fortiori*, it could not conceivably have contemplated any Federal invasion of the prerogatives of the State courts.

Federal Power Commissioner Seavey, speaking as a member of the Commission, said of H. R. 5423, for which S. 2796 was substituted, that it was conceived entirely as a supplement to and not as a substitute for State regulation. His assertion that it was not the intention of this legislation to supersede State regulation was supported by the statement of Dozier DeVane, General Solicitor for the Commission. (Hearings on H. R. 5423, 74th Cong., 1st Sess., Pt. I, p. 402.)

Typically illustrative of the testimony before the Congressional committees which considered this legislation, as to the essentially local character of the electrical industry, was that of Dr. Walter M. W. Splawn, special counsel to the Committee on Interstate and Foreign Commerce of the House of Representatives, then and now a member of the Interstate Commerce Commission. Among other things, Dr. Splawn said:

> "* * * The physical set-up in this operation is local and, at most, regional. * * * That is to say, *this is an industry which is essentially local and which should be regulated, should be managed,*

> *locally, and therefore regulated locally. That is, by the municipalities and by the States.*" (Hearings on S. 1725, 74th Cong., 1st Sess., p. 75; hearings on H. R. 5423, 74th Cong., 1st Sess., Pt. I, p. 180.) [Italics supplied.]

As Mr. Justice Roberts observed in his dissenting opinion in the *Jersey Central Power & L. Co.* case, 319 U. S. 61, 87, decided May 3, 1943, "In the light of this [legislative] history it is evident the Congress specifically refrained from the regulation of the business of any utility whose business transactions, especially as respects transmission and sale of energy, state authority could regulate. Such is the instant case." And such very emphatically is the case at bar, for Northwestern is comprehensively regulated by the authorities of Oregon and Washington as to every aspect of its business which concerns the general public.

Substantially all of the revenues of Northwestern are returned under intrastate rates which are not subject to the jurisdiction of the Commission, which also loses its jurisdiction over the issuance of securities if, as is the case here, the public utility is "organized and operating in a State under the laws of which its security issues are regulated by a State Commission" (Section 204(f) of the Act). In this connection, it is significant that in the approximately eight years during which the Act has been effective, the Commission has engaged in no formal proceedings whatever affecting Northwestern, except with respect to accounting matters.

The generation and distribution of electrical energy are primarily matters of local situs and concern. *Utah Power & Light Company* v. *Pfost*, 286 U. S. 165; *Public Utilities Commission* v. *Landon*, 249 U. S. 236. The Interstate Commerce Act vests in the Interstate Commerce Commission

"a single administrative initiative and primary control" over the transportation systems of the country. *Procter & Gamble Company* v. *United States*, 225 U. S. 282, 296. By way of contrast, the State regulatory authorities alone have that comprehensive supervision over electric public utility companies which enables the direction of a harmonious development of such companies in the light of duties imposed upon them in the public interest.

Furthermore, Northwestern is a Washington corporation and the courts of that State alone have authority to determine the adequacy of the consideration received upon the issuance of capital stock of corporations organized under the laws of that State or to enforce payment of an allegedly unpaid stock subscription.

Rogers v. *Guaranty Trust Co. of N. Y.*, 288 U. S. 123;
Cohn v. *Mishkoff Costello Co.*, 256 N. Y. 102;
Beasley v. *Mutual Housing Co., Inc.*, 39 F. (2d) 290 (Ct. App. Dist. Col.);
Wallace v. *Motor Products Corp.*, 25 F. (2d) 655 (C. C. A. 6th).

Moreover, as the record shows, the rights of American in the common stock of Northwestern have been specifically adjudicated by a Washington court of competent jurisdiction.

In view of both the language of the Act and its legislative history, disclosing such a pronounced Congressional intent not to give the Commission jurisdiction over any phase of utility regulation as to which the States were already exercising authority, the provisions of Section 301 (a) of the Act which purport to authorize the Commission to "determine by order the accounts in which particular

outlays and receipts shall be entered, charged or credited," certainly are not to be so construed as to make definitions and regulations issued in connection therewith determinative of legal rights regardless of consequences. Otherwise, the statutes of a State, and the decisions of its highest court interpreting the law of such a State, cannot be determinative and afford no assurance as to any contractual right or liability; all legal and equitable rules may be disregarded (in effect, discarded) and all past transactions, however remote, become subject to review and adjustment in accordance with what the Commission, in its own unfettered discretion, may consider desirable for its purposes.

The lower court's construction of the statute, which confirms a retrospective determination by the Commission of judicial questions determinable only under the laws of Washington, could not have been contemplated by the Congress. Such a construction is not in harmony with the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78, in which this Court, overruling *Swift* v. *Tyson* and holding that there is no Federal general common law, quoted with approval the following statement made by Mr. Justice Field in *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 401:

> "* * * Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

Even aside from constitutional limitations, the broad general language of such a statute as Section 301(a) of the

Act should not be construed as authorizing affirmative action which interferes with antecedent rights, except under conditions which clearly do not obtain here.

> "* * * a retrospective operation will not be given to a statute which interferes with antecedent rights, * * * unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature'."
>
> *Union Pacific Railroad Co.* v. *Laramie Stockyards Co.*, 231 U. S. 190.

> "Courts will not * * * enforce a literal interpretation [of a statute] when by doing so antecedent rights are affected * * *."
>
> *Union Pacific Railroad Company* v. *Snow*, 231 U. S. 204, 213.

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."
>
> *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59.

Commission has no authority over payment of dividends.

The Commission's order requires Northwestern to refrain from paying any dividends on its common stock until the amount of $3,500,000 has been entirely amortized. In this connection, it should be enough to say that jurisdiction over the declaration and payment of dividends by Northwestern, a subsidiary of a registered holding company, resides in the State of Washington or is vested upon the Securities and Exchange Commission by Section 12(c) of the Public Utility Holding Company Act of 1935 (15 U. S. C. A., §79*l*(c)), and that conflicts of jurisdiction between these Federal agencies must be resolved in favor of the

Securities and Exchange Commission (16 U. S. C. A., §825q). Nor may it successfully be asserted that the Federal Power Commission did not, in this instance, intend to exercise jurisdiction over the payment of dividends. In its original opinion, after describing the effect of its order upon the holder of Northwestern's common stock, the Commission said: "Certainly dividends should not be paid on the common stock until it has the equivalent of a paid-in value" (R. 69). Furthermore, the stays of the Commission's order pending appeal were granted by the Commission and by the lower court upon the express condition that no dividends be paid on Northwestern's common stock during the stay period.

The declaration and payment of dividends by Northwestern is not within the jurisdiction of this Commission. Even assuming for the sake of argument that the Securities and Exchange Commission may be in a position to give effect to such a statement of policy, the Federal Power Commission is wholly without authority to deal with the problem.

Only limited jurisdiction conferred on Commission.

We may summarize our contentions by saying that both the language and legislative history of the Act disclose that only a limited accounting jurisdiction has been granted to the Commission and that it was not the legislative intent that such jurisdiction should be so exercised as to ignore present value, infringe the rights of the States to deal with both the local business and the internal affairs of non-licensee utility companies operating within their jurisdiction or organized under their laws, and to interfere with antecedent rights vested under applicable state laws and judicial decisions. To carry out the true legislative intent of Section 301(a) of the Act, this Court should, it is submitted, hold either (1) that the Commission's order here

under consideration is beyond the scope of the Commission's statutory authority in so far as it purports to relate to the general and fundamental books of account of Northwestern rather than to a mere memorandum set of books or accounts to be kept for the information of the Commission, or (2) that, if such order properly relates to the general and fundamental books of account of Northwestern, it is beyond the Commission's statutory authority in so far as it purports to go beyond the mere segregation of items into separate accounts for the purpose of furnishing information to the Commission, requires the writing off of asset amounts already held valid under applicable State law, and attempts to regulate the capitalization of Northwestern and its payment of dividends.

In short, if Congress had intended to grant the Commission the authority which it attempts to exercise by the order here under consideration, the following addition to Section 301(a) of the Act would have been required to be made:

> The Commission may require licensees and public utilities, either retroactively or otherwise, to effect such accounting transactions and to make such accounting entries as the Commission shall deem appropriate in the exercise of its jurisdiction under this section. In requiring particular accounts to be debited or credited, the Commission may disregard the present value of any property, whether tangible or intangible, represented by any asset account, and may require such account to be written off by debits to surplus or otherwise amortized or disposed of, if the value represented thereby is in excess of original cost as defined and determined by the Commission. For the purpose of effecting the amortization or other disposition of a particular account, the Commission may require any licensee or public utility to refrain from the payment of dividends upon any class or classes of capital stock until such ac-

> count shall have been so amortized or disposed of. In this connection, the Commission may, in effect, determine, without consideration of the law of a public utility company's State of incorporation and in complete disregard of the decrees and judgments of the courts of such State, (*a*) that the stock of any such public utility has not been lawfully issued for what the Commission deems to be adequate consideration; (*b*) that such stock is, in effect, without value in the hands of an innocent purchaser for value, and (*c*) that such innocent purchaser for value shall contribute the full par value of such stock. The Commission may require any public utility having in its accounts a substantial excess of book cost over original cost to effect a quasi-reorganization without giving any weight whatever to the present value of the properties of such public utility or to its established earning power.

Certainly the Congress would not have enacted any such provision, and it is submitted that the Commission's ambit of authority should not be permitted to acquire any such astonishing elasticity either by administrative arrogation or by judicial construction.

II.

As a matter of substantive due process, the Commission's order goes far beyond any authority which Congress could confer, since it deprives petitioners of vested property rights in contravention of the due process clause of Article V and in contravention of Article X of the Amendments to the Constitution.

Under Point I, petitioners have contended that, as a matter of statutory construction, the Commission's order is beyond the scope of the authority which Congress intended to confer. Petitioners now make the further contention that, regardless of legislative intent or any

authority which the statute may purport to give, the scope of the Commission's order is beyond any authority which Congress could have conferred upon the Commission, because it deprives the petitioners of vested property rights without due process of law.

As has already been mentioned, Northwestern is a corporation organized under the laws of the State of Washington. It operates electric facilities in the States of Oregon and Washington and steam-heating facilities in Oregon and is subject to comprehensive regulation by the States of Washington and Oregon as to accounting, rates, adequacy of service, contracts with affiliated interests, and every other aspect of its business which concerns the public. As has also been pointed out, Congress did not intend, when it passed the Federal Power Act, to take away from the States any matters which were already under State control and regulation, but merely wished to provide a Federal authority to deal with those matters which, because of their interstate nature, were beyond the control of the State authorities. Therefore, Northwestern's rights with respect to internal affairs and capital structure are still governed by the laws of the State of Washington.

Moreover, even if the jurisdiction of the State of Washington for the purpose of determining these rights is held to be impaired by the passage of the Federal Power Act and the authority therein granted to the Commission, it is certainly true that, before the passage of that Act and the promulgation of the Commission's system of accounts, the laws of the State of Washington controlled the validity of Northwestern's actions and that rights lawfully acquired under what was then the clearly applicable law of that State are now vested rights. Thus the Commission's order, by impairing Northwestern's capital structure and its right to pay dividends, is depriving that company of vested property rights.

Just one illustration should suffice to indicate the effect of the order on Northwestern's credit, *i.e.*, its ability to do future financing:

Assume that an Eastern Oregon desert farm cost $10,000 to acquire and equip with an irrigation system in 1911. By 1942, however, price levels had so changed and the owner had been so successful in its development and operation that the farm had appreciated in value by $20,000, having become, on the basis of a conservative appraisal, worth $30,000.

The farmer now prepares a balance sheet, putting down these two items on the asset side: Cost of farm, $10,000; additional values representing appreciation due to skilled management, capitalized earning power, value of fertile land under water in excess of value of desert land plus cost of irrigation system, accessibility of markets, etc., $20,000. Oregon mutual savings banks may lend up to 60 per cent. of the "actual cash market value" of real estate, but let us further assume that, during the emergency, the Federal government has preempted the rural credit business through the Farm Credit Administration, and has enacted legislation entitling farmers to borrow up to 60 per cent. of the value of their farms. However, if the Farm Credit Administration had become a disciple of original cost, it might say to our farmer, "Sorry, but your $20,000 item represents values for which you paid nothing. That item 'has no place in the accounts' of a properly operated farm under our system of accounts and must be written off 'if sound accounting practices are to prevail', regardless of the farm's value. We can lend you only 60 per cent. of your original cost, or $6,000. Furthermore, you may not make personal use of any income from your farm until you have accumulated a surplus against which the $20,000 of what we call inflation in your property may be written off."

It is submitted that our farmer would have good grounds for the belief that his credit had been impaired and his property taken without just compensation. Northwestern and its security holders naturally entertain similar sentiments.

Effect of order on American.

That American, a party to these proceedings and one of the petitioners both in the court below and in this Court, is having its property taken without just compensation, and is being deprived of its property without due process, seems equally clear. American is the owner of all the outstanding common stock of Northwestern, which it purchased in an open-market, arm's-length transaction in 1925 (Ex. 87; R. 926, 1064-1065), which was issued in 1936 in exchange for the original $100 par value common stock, and which, under the law clearly applicable at the time of such acquisition, American holds as fully-paid and non-assessable. *Davies* v. *Ball*, 64 Wash. 292, 116 Pac. 833; *McCandless* v. *Furland*, 296 U. S. 140, 161; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 202-203. The common stock which it so owns is validly-issued (Ex. 89; R. 23, 970-975, 1065-1070), and American is entitled, by way dividends on said common stock, to so much of the net income of Northwestern in excess of that Company's preferred stock dividend requirements as its directors may think feasible to distribute consistently with its cash resources and cash requirements. For the year ending May 31, 1940, for example, Northwestern's net income available for the payment of common stock dividends was more than $220,000, or more than 6% on its $3,500,000 present par value of outstanding common stock (R. 25).

However, the Commission, by the application of an original cost yardstick which disregards existing property

values, has determined that all amounts in excess of original cost in Northwestern's plant account must be written off and that, therefore, American must forego all dividends on Northwestern's common stock until, to use the Commission's own language, there has been obtained "from the holders of the common stock (the holding company) a consideration of $3,500,000 for the stock", *i.e.*, until American has paid for the stock $5,021,799.33, plus $3,500,000, or a total of $8,521,799.33. The effect of the order is gravely to impair the value of American's present investment in Northwestern's common stock.

The Commission's order was entered without any apparent consideration having been given American's rights and status as the holder of said stock. Nor does the opinion of the court below indicate any recognition of American's status as the innocent purchaser of such stock.

On the contrary, the Commission's brief in opposition to our petition for certiorari asserted, without citation of authority and without pertinent reference to the record, and its brief on the merits presumably will repeat, that American's arm's-length purchase of Northwestern's common stock at a cost of $5,021,799.33 is "irrelevant in this proceeding". Why and how is that fact irrelevant? Why was American permitted to become a party to this proceeding if not to defend that investment?

That such a taking of vested property rights as the Commission's order contemplates is condemned by the Fifth Amendment has been made abundantly clear by decisions of this Court. Although Congress, as an incident of the exercise of its commerce powers, may impair contract rights, it may not confiscate property founded on contract rights vested at the time of the passage of an act purporting to grant such power, either for the benefit of the public or for one individual or group at the expense of another.

For example, in *Lynch* v. *United States*, 292 U. S. 571, Mr. Justice Brandeis, speaking for the Court, said, at page 579:

> "*Second.* The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235, 238; *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 67."

Again, in the case of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, construing the so-called Frazier-Lemke Act of June 28, 1934, it was held, also in an opinion by Mr. Justice Brandeis, that, although that Act was adopted pursuant to the broad bankruptcy powers granted to Congress under the Constitution, the power therein granted must be exercised subject to the restrictions of the Fifth Amendment and that Congress may not take for the benefit of the debtor rights in specific property acquired by the creditor prior to the date of the Act. The Court said at pages 589 to 590; 597; 601 to 602:

> "*Fourth.* The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. Compare *Mitchell* v. *Clark*, 110 U. S. 633, 643. But the effect of the Act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the Bank prior to the Act.

* * * * * *

"* * * Under the Act, the purpose of the delay in making a sale and of the prolonged possession accorded the mortgagor is to promote his interests at the expense of the mortgagee.

* * * * * * *

"* * * The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. Compare *Ochoa* v. *Hernandez*, 230 U. S. 139, 161; *Loan Association* v. *Topeka*, 20 Wall. 655, 662, 664; *In re Dillard*, Fed. Cas. No. 3912, p. 706. As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation."

An even more vigorous statement of the doctrine here applicable is contained in *Osborn* v. *Nicholson*, 13 Wall. 654, pp. 662-663, where this Court said:

"But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that when the 13th Amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will or contract of marriage, or other contract executed according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in full force. *This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities.* A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils. It would be contrary to 'the general principles

of law and reason,' and to one of the most vital ends of government. * * * The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the Amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. It is wholly silent upon the subject. *The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another.* And the deprivation would be 'without due process of law.' This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the states and the nation. * * *. What would be the effect of an amendment of the national Constitution reaching so far—if such a thing should occur—it is not necessary to consider, as no such question is presented in the case before us." [Italics supplied.]

See also:

Monongahela Navigation Co. v. *United States*, 148 U. S. 312;

Chicago, Rock Island & Pacific Railway Co. v. *United States*, 284 U. S. 80.

Although it contains no express reference to American's status as an innocent purchaser for value of the common stock of Northwestern, the opinion of the court below does make this observation as to American's normal right to dividends on such stock:

> "While it might be said that American is not entitled to the earnings until declared as dividends, and therefore nothing has been taken from it, that view disregards realities. *It is certainly possible, if not probable, that the market value of the stock would decrease, probably substantially, if no dividends can be paid thereon for ten years or more.* [Citing *Kansas City So. Ry.* v. *United States*, 231 U. S. 423, 455.] [Italics supplied.]

The *Kansas City* case—which is fully discussed and completely distinguished in another connection (pp. 71-72, *infra*)—, in so far as it deals with current accounting and the determination of income through charges to operating expenses, approves what may reasonably be considered the exercise of a legislative function within the distinction noted in *Crowell* v. *Benson*,[5] 285 U. S. 22, 49, 57, and *Prentis*

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[5] In *Crowell* v. *Benson*, this Court cites with approval the following quotation from the case of *Den* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 284:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

And states, at page 57:

> "* * * The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

v. *Atlantic Coast Line Company*, 211 U. S. 210. But in the case at bar, the Commission has made a judicial determination which involves a clear arrogation of judicial functions.

Petitioners emphasize again that they are not objecting to the mere segregation by the Commission of book values into the separate components of original cost and excess over original cost. For the Commission to seek factual information as to the original cost of property is a pertinent and relevant inquiry. What petitioners do object to is the assumption by the Commission of authority to order the writing off of all amounts on Northwestern's fundamental books of account in excess of the original cost of its properties, particularly when American and Northwestern have vested rights based on the present fair value of Northwestern's properties, including the right to have its books reflect its true capitalization arising out of the reorganization of Northwestern in 1936.

The fair value of its property has very real significance to Northwestern, since the fair value rule has been and is enforced as a basis of rate regulation by the decisions of the Supreme Courts of both Oregon and Washington, in which Northwestern carries on its operations.

> "The first subject of inquiry is the present fair value of the company's property, useful and being used by it in rendering telephone service to the public. • • •"
>
> *Pacific Telephone & Telegraph Co.* v. *Wallace*, 158 Ore. 210, 75 Pac. (2d) 942, at p. 950.

> "The trial court correctly held that appellant, in determining the fair value of respondent's property,

erred as matter of law in finding that the fair value of the property was its original cost less an amount equal to a proportion of the depreciation reserve account. * * *"

State of Washington ex rel. the Pacific Tel. & Tel. Co. v. *Department of Public Service of Washington*, Washington Decisions, Vol. 119, No. 9, p. 309. (Decided October 22, 1943 and not yet reported in the Pacific Reporter.)

And the fair value principle generally remains as vital as ever. For example, in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940), the Court, speaking through Mr. Justice Douglas, sustained the constitutionality of the Bituminous Coal Conservation Act of 1937, but held that, under that statute, the prices fixed must produce a fair return on the fair value of the property, saying, at page 397:

"* * * These maximum prices must be fixed at a uniform increase above minimum prices so that in the aggregate they will yield a reasonable return above the weighted average total cost of the district. *And no maximum price shall be established for any mine which will not yield a fair return on the fair value of the property.* * * *" [Italics supplied.]

Again, the Commission's order requires Northwestern to effect a quasi-reorganization, on the basis of a thirty-year-old transaction, by the writing-off of its common stock and by an enforced contribution of the full par value thereof

from the holder of such stock.[6] Furthermore, it requires such quasi-reorganization without giving any consideration whatever to earning power or any other criterion of fair value. In all reorganization cases, the present value of the properties established in the light of their present and prospective earning power is a necessary and universally applied basis for determining the rights of the parties.

Consolidated Rock Products Co. v. *DuBois*, *supra*, and cases there cited;

In Re Western Pac. R. Co., 124 F. (2d) 136 (9th C.C.A.);

Finletter, The Law of Bankruptcy Reorganization (1939), 557-560;

Craven and Fuller, The 1935 Amendments of the Railroad Bankruptcy Law, 49 Harvard Law Review, 1254, 1272-1274;

Bonbright, Valuation of Property (1937), 884-893;

Dewing, The Financial Policy of Corporations (1941), Vol. II, pp. 1373-1376;

In the Matter of Utilities Power & Light Corp., 5 SEC 483, 500-501;

In the Matter of Puget Sound Power & Light Company et al., SEC , decided April 28, 1943.

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[6] As the Securities and Exchange Commission observes in its Accounting Series Release No. 25, dated May 29, 1941 (quoting an opinion prepared by its chief accountant, William W. Werntz), "The term quasi-reorganization has come to be applied in accounting to the corporate procedure in the course of which a company, without the creation of a new corporate entity and without the intervention of formal court proceedings, is enabled to eliminate a deficit whether resulting from operations or the recognition of other losses or both and to establish a new earned surplus account for the accumulation of earnings subsequent to the date selected as the effective date of the quasi-reorganization."

Strictly as a matter of accounting, decisions of this and other courts indicate that the Commission erred in not taking into consideration the present value of the properties and business of Northwestern for the purposes of the determinations upon which its order is based.

For example, in *Atlanta, B. & C. R. Co.* v. *United States*, 296 U. S. 33, which apparently is the only case in which the use of a railway valuation for accounting purposes became an issue, Mr. Justice Brandeis, speaking for this Court, sustained the decision of the lower court which had required the Interstate Commerce Commission to give due consideration to the present fair value of the property for balance sheet purposes. In this case the accounting company purchased the assets of the bankrupt railway with its own preferred and common stock and sought to set up on the asset side of its balance sheet the value of the properties purchased as of a date found by the Commission. The Commission contended that the balance sheet must reflect the par value of the preferred stock and the cash consideration which another railway company had agreed to pay the bondholders' committee for the common stock. The lower court, in 28 F. (2d) 885, held that neither such par value nor the cash consideration for the stock paid by another company to a third party represented the proper value of the assets for balance sheet purposes and ordered a rehearing.

Upon such rehearing and subsequent appeal to this Court, it was held that the Commission had not issued an order subject to the jurisdiction of the district court. Thereafter the whole situation was reopened by the Commission, and evidence was introduced both by the Commission and the railway as to the value of the property. The Commission having predicated its decision upon due consideration of the present fair value of the property, together with

other considerations, both the lower court and this Court sustained its findings. Although the Commission found the same dollar value as it found in the first proceeding, the lower court (in 12 F. Supp. 782) and this Court (in 296 U. S. 33) sustained the finding, since apparently there was ample evidence to support such valuation. The importance of the opinion, however, rests upon the recognition of the principle that due consideration must be given to the present fair value of the company's property for balance sheet purposes.

It is submitted that, in *A. T. & T. Co.* v. *United States*, 299 U. S. 232, this Court did not impeach the present value rule as a basis for proper accounting or require a reclassification of the telephone company's accounts in the sense that its fundamental books of account might thereafter reflect as an asset only the original cost of its property. The Court merely held that the classification of the uniform accounting system was proper, provided due consideration was given to the sum representing the difference between original cost and present value (see pages 240, 241 and 242). In fact the Court indicated that differences between book value and original cost could properly be ordered written off only if the difference were a "fictitious or paper increment" rather than "a true increment of value."

Significant also in this connection is *Passaic Consolidated Water Company* v. *Board of Public Utility Commissioners*, 139 Atl. 324; aff'd 141 Atl. 921, in which the Supreme Court of New Jersey held that a utility had the right to record on its books "the full value of its property" and by clear implication approved the past recognition of appreciated values for accounting purposes. This decision was recently (1940) referred to by the New Jersey Board of Public Utility Commissioners in its opinion in *Re Jersey*

Central Power & Light Company, 33 P. U. R. (N. S.) 207, the Board saying, at page 212:

> "• • • The identification of 'write-ups' in approximately this amount does not create, however, a supposition that the restatements of book cost were illegitimate, improper, or unreasonable at the time when made. In fact, the past recognition of appreciated values for accounting purposes is implied by the decision of the Supreme Court of New Jersey in Passaic Consol. Water Co. *v.* Public Utility Comrs. (1927) 5 N. J. Misc. R. 1078, P. U. R. 1928 B, 242, 139 Atl. 324 (aff. [1928] 104 N. J. L. 666, 141 Atl. 921), to the effect that in 1925 a utility had the right to record on its books 'the full value of its property' • • •"

See also: *People ex rel. Iroquois Gas Corp.* v. *Pub. Serv. Comm. of State of N. Y.*, 264 N. Y. 17, 189 N. E. 764;

Matter of Village of Wellsville v. *Maltbie*, 257 N. Y. App. Div. 746;

Matter of New York Edison Co. v. *Maltbie*, 244 N. Y. App. Div. 685;

Matter of Lockport Light, Heat & Power Co. v. *Maltbie*, 257 N. Y. App. Div. 11.

Criteria other than original cost should be considered

As a matter of logic and economics, quite apart from constitutional requirements or the requirements of fair play, the Commission should not be able either completely to disregard value or to use what it calls original cost as the *sole criterion* of value for any regulatory purpose whatever without giving at least some consideration to other criteria of value.

Cost is not value but is only a single indicator of value, and it is an accurate indicator of value only as of the time

of payment and under the circumstances then prevailing. If cost, as an indicator of value, is to be applied at another time and under other circumstances, it must be converted to the purchasing power of the medium of exchange prevailing at such other time and under such other circumstances and recognition also must be given to changes in the economic value of the assets sought to be appraised. Only by coincidence would value established on the basis of original cost be the same as present value at some later date. Cost, therefore, is certainly less significant, in our dynamic economy, than other indicators of value.

Original cost is strictly a one-way street for the utility industry. If we enter a period of serious deflation after the war, it will be politically and economically impossible for the utility industry to maintain its rates on an original cost basis after price levels have receded substantially. Much utility service is competitive (thermal applications of electricity and gas and large power installations, for example) and, in the struggle for business in a period of serious deflation, utilities would have to bring their rates down, whatever they might be entitled to earn as a matter of theory. And of course it is axiomatic that a public utility company is never guaranteed a particular rate of return. Such a company is merely allowed a specified rate of return, *if it can earn it* under the prevailing economic conditions.

On the other hand, in a period of runaway inflation, which is no longer a mere academic possibility, application of the original cost doctrine would lead to preposterous results. Any well-stocked corner grocery store might well, in such circumstances, have more value, measured in inflated dollars, than the entire plant account, frozen at original cost, of an electric utility company serving the District of Columbia. As a matter of fact, when the German inflation was at its height, the original

cost of all the public utility properties in the entire German Reich was less than the then value or cost of a ham sandwich, expressed in terms of the depreciated mark.

Original cost limited in significance.

There obviously is grave inequity in the requirement that existing values be written off upon the basis of the Commission's determination of accounting costs without recognition of the fact that, with the passing of time, recorded dollar costs lose their original significance as an expression of committed purchasing power. The statement of costs in Northwestern's accounts, as adjusted by the Commission, does not reflect costs in terms of the current dollar. Accounting, for reasons of practical necessity, employs the dollar as a unit of computation in its attempt to interpret financial transactions in terms of the common medium of exchange, but assuming a static dollar. This commingling of ancient costs which were stated in terms of a dollar of greater purchasing power with costs stated in terms of the present dollar, is, in a sense, similar to the commingling of apples and cabbages, or of rubles and dollars, without translation into a common denominator. The statement of this fundamental concept is not an impeachment of accounting; it is only recognition of practical limitations and arbitrary assumptions inherent in its rules and conventions.[7]

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[7] "The assumption that recorded dollar cost continues to represent actual cost permeates accounting thought and practice, as it does the law. Accounting, in other words, assumes a stable measuring unit. In periods of major price movements this assumption is clearly invalid for certain purposes, as has been pointed out by various writers in recent years. Undoubtedly interpretative accounting faces a challenge at this point." (Paton and Littleton, An Introduction to Corporate Accounting Standards, p. 23.)

"The success of the whole system of business depends upon the truthfulness of reports. The truthfulness of reports depends mainly

The cost of property is significant as an expression of economic sacrifice or contribution at the date of acquisition. With the passing of time, however, dollar cost as recorded at the time the investment is made cannot be relied upon even as a measure of the actual contribution to the enterprise. Assume, for example, that a power site cost $100,000 and that subsequently the value of the measuring unit, the dollar, is cut in half by an advance of 100 per cent in the general price level. With these conditions, the actual cost of the site clearly becomes $200,000 when expressed in the cheaper dollars of the later period.

Mr. Charles W. Smith, Chief of the Commission's Bureau of Accounts, Rates and Statistics, and its principal witness in this proceeding, said in a paper read before the 1940 convention of the American Gas Association, "In the absence of cataclysmic price upheavals, the original cost principle, in my opinion, will lead to more informative financial and operating statements * * *." The question, of course, is: Whose cataclysm and who gets upheaved? Even a change in price levels of no more than 25 or 30 per cent may mean the difference between substantial value and worthlessness to a holder of equity securities, just as it may mean success or bankruptcy to a small merchant. In all events, well within Mr. Smith's own lifetime, the Engineering News-Record Construction Cost Index went from a low of 43 in 1914 (using 1926 prices as 100) to a high of 121 in

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upon the truthfulness of accounting. The truthfulness of accounting depends largely upon the truthfulness of the dollar—and the dollar is a liar! For it says one thing and means another. * * *

"Furthermore—and important to note—although the unreliability of accounting has been great enough during the recent years of unparalleled prosperity and depression, it threatens to be even greater in the immediate years to come. For inflation, to at least a limited degree, continues to lurk ominously on the economic horizon." (Preface to "Stabilized Accounting", Dr. H. W. Sweeney, Harper & Brothers, 1936.)

1920, dropped to 76 in 1932 and has gone back to 141.5 as of October, 1943, some 329 per cent of the 1914 figure.

Rigid formula for establishment of value not workable.

No rigid and ostensibly simple formula for the establishment of value is workable in the long run. In the absence of market place valuation, some other method must be devised which will be flexible enough to give consideration to all elements of value, with an impartial referee available to arrive at a judgment figure which will prevent injury to the public on one hand and to investors on the other. The value theory established by long practice in our dynamic economy (which embraces not only public utilities, but all of the customers, vendors, employees, investors and others with whom such utilities daily conduct the transactions which compose their complex business) gives full recognition to these considerations.

Original cost either as an end in itself or as the sole criterion of value for all regulatory purposes certainly assumes a static economy. And, if it does not assume a static utility industry, it might well be condemned judicially, because, if it is made the sole yardstick, as in this case, public utility enterprises will *not* be able to attract capital. Certain of the reasons why, in such circumstances, investors will shun utility securities, are, briefly:

(1) Recognition would be denied to proven values inherent in an enterprise which has survived risks of operation over a period of years;

(2) In periods of rising price levels, capital obviously would not seek investment in business where the door is opened to possible loss but closed to possible gain;

(3) The greater part of utility revenues is derived from competitive business, so that rates must go down when price levels fall; and

(4) It is no answer to say that capital can be attracted by increasing the rate of return while maintaining a constant original cost base. Such an expedient would be impracticable (regulatory authorities could not permit "excessive" rates of return) and, in any event, it merely shifts the valuation process from base to return, because a change in return necessarily affects the value of the base.

The utility business is geared tightly to every phase of our national economy and therefore the original cost principle cannot be applied to the public utility industry alone without discriminatory and disastrous results.

And if original cost as a sole measure of value were to be imposed upon all business, the result necessarily would be abandonment of the principle of private profit and individual initiative, as well as abandonment of fundamental democratic civil liberties, and the adoption instead of a completely managed economy through some form of "statism" so that all risks could, in so far as possible, be government assumed and government controlled. In fact, it is not too much to say that the original cost doctrine is only understandable as an incentive to and an instrument for supplanting private ownership by government ownership.

It is submitted, therefore, that in ordering the elimination from the general books of account of Northwestern of all book values of its assets in excess of original cost without consideration of the value of the properties supporting

such assets, and in adjusting the capital structure of Northwestern without consideration of the values upon which it was and is based, the Commission is depriving the petitioners of rights vested under applicable State laws and adjudicated by a State court of competent jurisdiction.

Such deprivation of vested rights is in contravention of the due process clause of Article V and in contravention of Article X of the Amendments to the Constitution. Hence it is submitted that this Court, to avoid holding that the statute makes an unconstitutional delegation of power to the Commission, should hold either that the Commission's jurisdiction is limited to a separate set of books of account kept for the information of the Commission, or that, while the Commission may segregate original cost from book values in excess thereof on the fundamental books of account of Northwestern, it may not order the elimination from such books of account of amounts in excess of original cost which were recorded on its books and supported by the value of its properties before the Commission's system of accounts became effective, and which are still supported by the value of Northwestern's properties.

III.

As a matter of procedural due process, the order of the Commission is arbitrary and capricious in that (a) it was made without consideration of petitioners' proffered evidence of the present fair value of Northwestern's assets, (b) it is completely unsupported by accounting authority, accounting principle, or other evidence, and ignores Northwestern's existing surplus, (c) it jeopardizes future preferred stock dividends and (d) it fails to recognize the true character of American's investment.

Proffered Evidence of Value.

The following is, in summary, the evidence the court below ignored, on the untenable ground (see pp. 76-78, *infra*) that the question had previously been decided by it, and which the Commission held to be "entirely irrelevant and immaterial" on the issue of whether, to what extent, and in what manner it should direct the disposition of $3,500,000 of values long recorded in the capital accounts of Northwestern:

> (a) That the net income available for the payment of dividends on Northwestern's common stock in 1922, 1923 and 1924, the three years immediately prior to the acquisition of such stock by American, was $156,941, $157,005 and $153,059 (Ex. 79; R. 850-851);
>
> (b) That the net income available for the payment of dividends on Northwestern's common stock in 1938, 1939 and 1940, the three years immediately prior to the rehearing in this matter, was $127,398, $289,921 and $125,851 (Ex. 79; R. 850-851);
>
> (c) That the average price per kilowatt hour received by Northwestern from its residential cus-

tomers was substantially below the national average in the entire period from 1922 to 1940, having ranged from 66% of such national average in 1922 to 58% thereof in 1940 (Ex. 85; R. 900);

(d) That the average consumption of kilowatt hours by residential customers of Northwestern was substantially above the national average in the entire period from 1922 to 1940, having ranged from 125% of such national average in 1922 to 169% thereof in 1940 (Ex. 86; R. 902);

(e) That the reproduction cost, less depreciation, of the property of Northwestern was not less than $13,750,000 as of December 31, 1924, and was not less than $20,900,000 as of June 30, 1940 (R. 921-922), in each case providing a coverage substantially in excess of the par value ($3,500,000) of the 100,000 shares of Northwestern's common stock (R. 921-922);

(f) That the enhancement in the structural value as of December 31, 1924 (just before American acquired Northwestern's common stock) of the property of Northwestern existing on that date, over the structural value of such property as of the respective dates on which such property was first placed in operation, was not less than $3,250,000, giving full consideration to accrued depreciation (R. 922); and

(g) That the price of the common stock of Northwestern on the San Francisco Stock Exchange in the period from January through March, 1925, just before American acquired such stock, ranged from 32½ to 47⅞ dollars per share (R. 965-968).

There is also other evidence actually in the record to the effect that Northwestern's rates are among the lowest of the nation's electric utilities; that it is meeting its obligations in full; that it has no preferred stock dividends

in arrears; that it has no bank loans, no short-term debt other than current accounts and no tax arrearages; that on December 31, 1939, it had on hand cash and other current assets of more than $1,600,000, as well as an earned surplus of $1,070,930.99 (Ex. 74, p. 10, R. Vol. III), and that, for the year ended May 31, 1940, it earned more than $220,000, or more than 6%, on its outstanding common stock (R. 25).

In a word, the record shows convincingly, and without a trace of evidence to the contrary, that Northwestern is a thoroughly successful enterprise which has prospered in spite of unusually low rates and active competition, that it has rendered uniformly excellent service, that it has performed a useful social function, and that the equity interest in the Company, represented by its common stock, *must be and is* valuable.

The pertinency of the value data becomes evident from what has already been stated in Points I and II with respect to the substantive rights which Northwestern and American have in the retention on the books of Northwestern of book values in excess of original cost where such book values are supported by asset values. In addition, the evidence with respect to the market value of the Northwestern stock at the time it was purchased by American is pertinent by way of showing that American acquired such stock in good faith as an innocent purchaser for value, believing it was buying an equity in the then value of the assets of Northwestern.

Commission order unsupported by accounting or other evidence.

The brief filed in this proceeding on behalf of the American Institute of Accountants, as *amicus curiae*, should be completely persuasive as to the utter lack of accounting

authority for the method of disposition required by the Commission's order here under review, but some further discussion of those respects in which the order, both from the point of view of accounting and otherwise, is arbitrary and capricious, may be appropriate. For the order affords a striking example of what Mr. George O. May of New York City, a recognized leader of the accounting profession, must have had in mind when he said, in the October, 1943, issue (pp. 296, 297) of The Journal of Accountancy, official organ of the American Institute of Accountants:

> "Already we see commissions which are vested with policy-making, regulatory, and quasi-judicial functions seeking freedom from legal restraints by asserting the higher authority of accounting principles, old or new, laid down by them and based supposedly on considerations of equity or economic reality. They next undertake to relax the application of such principles as a matter of regulatory expediency or administrative policy. Thus with the aid of legal presumptions of administrative expertness and impartiality, accounting may be made superior to law but still remain the not too rigid implement of policy. Acceptance of some postulates of accounting, such as those of its utilitarian character and the stability of the monetary unit, and disregard of others, such as those of continuity and consistency, have resulted in the development of concepts of accounting new in the field in which they are applied, of which original cost and straight-line depreciation in the utility field are perhaps the most notable. If the procedure is challenged in the early stages the defense is that only methods of recording and no substantive rights are involved. But once the record is established it is made the basis of orders which affect rights but are in practice almost irreversible. In the *Telephone* case [*American Tel. & Tel. Co.* v. *U. S.*, 299 U. S. 232], the Supreme Court

insisted on a stipulation designed to protect the utility from the practical effects of what was claimed and held to be only an order for classification of accounts. Later events have created doubts as to the effectiveness of such protection."

Perhaps the effect and implications of the Commission's disposition order would have become apparent if testimony had been offered as to the particular plan of disposition required by the order, but there is no evidence whatever in the record with respect to the amortization program which the Commission has directed Northwestern to follow. The order ignores Northwestern's substantial existing surplus and provides for an arbitrary "write-off" or amortization schedule which is wholly lacking in any factual or legal basis. Not one of the Commission's accounting witnesses so much as intimated that this particular scheme was even receiving consideration. It obviously was the product of staff and Commission discussion of which the petitioners had no notice and in which they were not privileged to take part.

The Commission's original opinion (R. 67-69) reveals its approach to the disposition question in these two paragraphs:

> "The applicable provisions of Account 107, Electric Plant Adjustments, are:
>
> "• • • Write-ups of electric plant prior to the effective date of this system of accounts shall be recorded herein.
>
> 'B. The amounts included in this account shall be classified in such manner as to show the nature of each amount included herein and shall be disposed of as the Commission may approve or direct.'

"The provisions of Account 107 require the disposition of the amounts recorded in that account. The Commission would be justified, as a matter of proper accounting, in ordering, under the provisions of Section 301(a) of the Federal Power Act, the immediate charging off of the amount in question. After considering the financial history and present status of the Company, as reflected in reports to stockholders and to this Commission, we are of the opinion that we should not order the amount to be charged off at once.

* * * * * *

"Considering all relevant factors, we find that it is in the interest of consumers, investors and the public to direct the disposition of the $3,500,000 write-up by requiring the Company to apply all net income above Preferred Stock dividend requirements to the disposition of the $3,500,000 in Account 107. This disposition, assuming adequate earnings, is the equivalent of obtaining ultimately from the holders of the common stock (the holding company) a consideration of $3,500,000 for the stock. Certainly dividends should not be paid on the Common Stock until it has the equivalent of a paid-in value."

Thus the opinion's only references to accounting principles relate to a disposition of the amount recorded in Account 107 which the Commission did not make. The disposition requirement of the Commission's original order, as affirmed and repeated in the order here under review, is not supported by any reference to accounting evidence, accounting theory or accounting authorities. There was no accounting evidence, no accounting theory and no accounting authority that could have been cited in support of that disposition. It seems clear that the Commission regarded the provision in the classification that the amounts included in Account 107 should be "disposed of as the Commission may approve or direct" as giving it an unfettered

discretion to deal with the matter upon such considerations as it might choose to regard as decisive.

How broad the Commission considered this discretion to be is indicated by the fact that it considered two widely discrepant alternatives permissible. One of these would have required "the amount to be charged off at once." The other permitted it to be carried as an asset for a wholly indefinite period. Assuming that Northwestern's earning capacity was indicated by its earnings of approximately $220,000 in excess of preferred dividend requirements for the year ending May 31, 1940 (R. 25), it would require sixteen years of such earnings to dispose of the $3,500,000 item which the Commission held that it could have ordered to be disposed of immediately.

In his testimony at the hearing which preceded the Commission's original order, Mr. Charles W. Smith, Chief of the Commission's Bureau of Accounts, Rates and Statistics (R. 361-362), first stated without qualification that, as far as accounting principles were concerned, the $3,500,000 in question should be removed from the books of the Company, without saying how this should be done. He then went on to express the view that amortization over a short period might be appropriate "as a policy and not an accounting principle." On the basis of Mr. Smith's testimony, how can it be argued that the Commission's disposition order is supported by substantial evidence? Counsel for the Commission obviously find themselves in the unhappy position of being required to contend that the Commission can depart from an accounting principle on the ground of policy and at the same time adhere to the accounting principle!

As to what is required by "sound accounting practices," it was the opinion of the Commission's own staff that the amount of $3,500,000 here under consideration "must be

disposed of if sound accounting practices are to prevail." Three members of the staff, Messrs. Smith, Van Scoyoc and O'Neil, offered their opinions in support of this proposition. We submit that mere opinons offered by the staff of a regulatory agency—particularly where such opinions are unsupported by citation of accounting authority, by reference to the decisions of other and more experienced regulatory agencies, or by authoritative judicial decisions—is not that "substantial evidence" upon which such an agency is authorized to rely in making its findings of fact "conclusive". *Cf. National Labor Relations Board* v. *Colombian E. & S. Company*, 306 U. S. 292, 299, 300.

Certainly the propriety of the action taken by Northwestern's stockholders and directors in reorganizing the capital structure of that company on the basis of an independent appraisal of the fair value of its properties has not been and cannot be questioned, although this reorganization has been ignored by the Commission. Nor is there any accounting or legal principle which requires the writing down of property below its present value.

In all events, if it is "sound accounting practice" to require corporations to write off substantially every dollar in excess of actual cash or the cost of tangible property received in consideration for securities issued, then the balance sheets of many American corporations large and small, as well as the validity of their issues of capital stock in the hands of innocent purchasers, are in grave jeopardy.

The Commission's disposition order clearly is within the condemnation of the language of Mr. Chief Justice Hughes in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Company*, 289 U. S. 266, 277:

> "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law."

An important aspect of the validity of the disposition order is in reality raised by the final sentence of the excerpt from the Commission's opinion quoted above. When the Commission says, "Certainly dividends should not be paid on the common stock until it has the equivalent of a paid-in value", it is clearly not laying down an accounting principle or a rule which it is the function of an accounting authority to lay down. It is undertaking to determine a question of the right to distribute dividends which lies primarily within the jurisdiction of the State of Washington and secondarily (so far as any such power is conferred upon a Federal agency) within the authority of the Securities and Exchange Commission. The law of the State of Washington on the question is clear (Rem. Rev. Stat. of Washington, Sec. 3803-24, 4.b). That law does not require that the amount of capital stock outstanding shall be limited to the amount of the consideration originally paid in therefor. It permits an appreciation in property to be recorded on the books and a stock dividend to be issued against that appreciation. Thus it permits the payment of stock dividends even though the capital stock outstanding is represented by a value that has grown up, as distinguished from having been paid in.

In the paragraph that intervenes between the two passages which we have quoted from its original opinion, the Commission recites that the Securities and Exchange Commission has exercised its authority over the dividend action of Northwestern and states that this action has, *inter alia*, "the effect of impounding the Company's earned surplus of $983,160.45 as of that date [*i. e.*, October 1, 1939]." (R. 68-69). The Commission thus knew that its own order for the impounding of $3,500,000 of earnings, in conjunction with that of the Securities and Exchange Com-

mission, would, if fully effective, result in creating a paid-in value for the $3,500,000 par value of Northwestern's outstanding common stock of approximately $4,500,000 in addition to the $3,500,000 already recognized by the reorganization of Northwestern in 1936, by almost $1,000,000. Clearly such an order could not be justified even by the sole consideration which the Commission advanced as justifying it.

The language of the opinion above quoted might suggest that the order was more lenient than one for immediate disposal. However, it is apparent that, in conjunction with the order of the Securities and Exchange Commission of which the Commission took notice, it would prevent the payment of dividends until a surplus had been built up that was almost $1,000,000 more than the amount of surplus that would have been needed to offset the complete writing-off of the $3,500,000 in Account 107. Thus the actual form of the disposition order was at the same time more oppressive and punitive than the alternative rejected by the Commission and completely at variance with accounting principles as laid down by the Commission's own Chief Accountant.

The opinion of the court below dismisses petitioners' contention that the order is arbitrary in that it ignores Northwestern's surplus with the statement that this argument is "not pertinent" because it has "no bearing on the 'original cost' theory of the system of accounts." On the contrary, the accumulation of earnings represented by Northwestern's existing surplus has contributed new and additional capital in precisely the same way that such capital would be contributed by the cessation of dividends required by the Commission's order.

If the purpose of the Commission's order is to provide "the equivalent of paid-in value", as it asserts, certainly

the asset value behind Northwestern's existing surplus is identical in every way with the values which may be provided by the accumulation of future earnings. The action of the Commission in disregarding this existing surplus and in requiring American to pay again for Northwestern's common stock out of future earnings thus is entirely arbitrary.

The issue here is fundamentally different from that presented in the case of *Kansas City Southern Ry. Co.* v. *U. S.* on which the Commission relies and which was cited by the court below by way of justifying a probable substantial decrease in the market value of Northwestern's common stock in the hands of American, an innocent purchaser for value. Upon this point the court below said:

> "However, in Kansas City So. Ry *v.* United States, 231 U. S. 423, 455, it was held that a railroad could be compelled to charge a disputed item against its earnings. The order involved here requires the same thing, and adopts the principle approved in the cited case. If a company can be compelled to charge an item against earnings, for one year, we see no reason why it cannot be compelled to make the same kind of entries for succeeding years."

It is submitted that, in the *Kansas City* case, capital had been expended in creating property. That property had been abandoned. The order required that the book value of the property should be charged to operating expenses in the year in which abandonment took place. This was merely a specific application of the common view that where property employed in operation is exhausted or abandoned, the cost thereof must be deducted from gross revenue in the determination of net income. If, as a result, it became impossible for the Kansas City Company to pay dividends on its preferred stock, this was merely the incidental result

which may at any time follow from the application of familiar rules for the determination of net income.

In the present case, no property which ever existed has ceased to exist and no charge to operating expenses or against net earnings would be warranted or is called for by the order. The order has no relation whatever to the determination of net income, which was the object of the classification prescribed by the Interstate Commerce Commission and attacked in the *Kansas City Southern* case. Here, the order deals with the disposition of net income *after it has been determined and in part distributed in dividends.*

The basically arbitrary character of the Commission's order finds further demonstration in its contradictory character. By forbidding the payment of dividends on Northwestern's common stock for what may be a substantial period of years, it assumes that such stock is presently without value in American's hands. Yet it assumes that the values presently inherent in the assets behind that very stock are such that they will produce sufficient earnings to amortize or "dispose of" $3,500,000 over what the Commission must envision as a comparatively short term of years! "A paradox, a paradox, a most ingenious paradox," in the best Gilbertian sense. And in this, as in other respects, the Commission's order is wholly unsupported by substantial, or any, evidence.

Future preferred stock dividends jeopardized.

The order unreasonably and arbitrarily jeopardizes future dividends upon Northwestern's preferred stock for the reason that if, as the Commission's order assumed, book records established in accordance with the Commission's "Uniform System of Accounts" are to become the sole criterion both of cost and of value for all purposes,

including dividend determinations, and if, measured by any such Commission yardstick, Northwestern's capital were, in fact, "impaired", so as to necessitate the cessation of common stock dividends, such "impairment" would also prevent the payment of prefered stock dividends. The rejected evidence of value demonstrates that Northwestern's capital has not been "impaired", so as to require the cessation of common stock dividends; but if the Commission should be sustained in holding, in effect, that any such "impairment" exists, a consequence of such a determination might be to stop *both* preferred dividends and common dividends. Section 3803-24, Rem. Rev. Stat. of Washington (1939 Supp.). Such an arbitrary and oppressive result was clearly not intended by the Commission, as its opinion and order expressly contemplate the continued payment of preferred dividends, without regard for any such alleged "impairment". But the Commission seems to have overlooked this clear implication in its opinion and order that there is sufficient value in Northwestern's property and business to cover its capital structure.

Disposition order ignores character of American's investment.

The essentially arbitrary and capricious character of the Commission's retroactive judgment of the rights and obligations of petitioners is further made apparent by the record. For example, the petitioners offered to prove (R. 922) that "the enhancement in the structural value as of December 31, 1924 [approximately the date as of which American acquired the common stock of Northwestern] of the property of Northwestern Electric Company existing on that date over the structural value of such property as of the respective dates at which such property was first placed

in operation was not less than $3,250,000, giving full consideration to the depreciation which may have accrued on such property as of December 31, 1924." Thus substantially all of the "excess" or "write-up" here under consideration was represented by such enhanced structural value. Since this is the case, such "excess" should be disposed of over the life of Northwestern's property and provided from operating revenues, as other amortization of physical property is provided for. (See in this connection the testimony of Charles W. Smith, the Commission's principal witness, R. 393-395.)

Assuming for the sake of argument that the Commission had any authority (and we deny that it had such authority) to enter an order affecting American's rights, if the testimony as to that Company's status was ignored by the Commission, its procedure was patently arbitrary and capricious. On the other hand (the Commission's opinion does not indicate which horn of this dilemma it grasped), if such testimony was actually considered and found "irrelevant" or "immaterial" or "incompetent", the Commission (and the lower court in affirming its order) clearly erred as a matter of law.

As Mr. Justice Brandeis said in *Baltimore & Ohio R. Co.* v. *U. S. (The Chicago Junction* case), 264 U. S. 258, 265:

> "• • • The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action."

See also:

Lloyd Sabaudo Societa v. *Elting*, 287 U. S. 329, 339.

IV.

As a matter of procedural due process, the court below deprived petitioners of their right to judicial review provided for by Section 313(b) of the Act and guaranteed by the due process clause of the Fifth Amendment.

In its opinion (on the "first review") affirming the reclassification of Northwestern's accounts required by the Commission's original order in this proceeding, the court below made these statements (R. 816-817, 819):

> "* * * Petitioner has as much property as it has ever had. The system of accounts takes nothing from petitioner. Petitioner may keep such other accounts as it desires. The present regulation only requires a particular system of accounts to be kept, not that other systems shall not be kept."

> "With respect to the common-stock item, a rehearing of the Commission's order was granted but not decided. *Until decided there is no 'order' to review here.* Fed. Power Comm'n *v.* Edison Co., 304 U. S. 375, 383." [Italics supplied.]

Furthermore, in the prefatory statement contained in its opinion (on the "second review" now under consideration) affirming the Commission's order of disposition, the court below said (R. 1234):

> "The Commission's order of December 6, 1940, ordered petitioner to credit Account 107 each year with an amount equal to its net income less its preferred stock requirements 'until the amount of $3,500,000 shall have been entirely extinguished.' Petitioner filed a petition for rehearing before the Commission. As it was still pending at the time of

> petitioner's first petition to review, *we were unable to consider the order insofar as it related to the common stock item.* 125 F. (2d) 882, 887. After our decision of the first petition to review, the Commission denied petitioner's petition for a rehearing, and petitioner then filed the instant petition to review. [Italics supplied.]

However, in the body of its second opinion, the court below made statements which, in themselves, clearly demonstrate that it misunderstood petitioners' contentions and that it misapprehended the character and effect both of its own opinion on the first review and of the Commission's disposition order under consideration on the second review. These statements are (R. 1237, 1239):

> "The arguments that the actual values of petitioner's business has been ignored by the Commission are not pertinent. *On the first review we approved the system of accounts prescribed, and we will not revive the arguments.*"

> "Finally, it is argued that the order deprives petitioner of its property without due process of law. *We previously held that petitioner was not deprived of the value of its properties without due process of law* (125 F. (2d) 882, 886)." [Italics supplied.]

We respectfully submit that the order affirmed on "the first review" merely required the segregation of Northwestern's assets, both tangible and intangible, in particular asset accounts and thus perhaps "took nothing" from the petitioners. But the Commission's order of disposition considered in the current "second chapter" *does* take the property of both Northwestern and American. *It is earnestly suggested that the petitioners were and are entitled to a judicial review of the nature of that taking.*

The effect of the Commission's order on Northwestern need not be repeated (pp. 41-43, *supra*), but we are at a loss to understand the lower court's statement that it "*previously held* that petitioner was not deprived of the value of its properties without due process of law." To the contrary, we submit that the lower court's previous opinion merely held that the system of accounts itself "takes nothing from petitioner" and expressly refrained from dealing with the punitive and destructive character of the order of disposition at issue on the second review. The question of disposition of the $3,500,000 simply was not in issue on the first review, unless it must be held, in spite of the opinion of this Court to the contrary in *American Tel. & Tel. Co.* v. *U. S.*, *supra*, that, upon reclassification of an item in Account 107, the disposition of such item in any manner which the Commission may elect follows as an automatic consequence.

As to American, no argument urged in the lower court's opinion has given even approximate consideration to our contention that American, as the owner of Northwestern's common stock, has suffered a taking of its property without due process.

American was not a party to the first proceeding. Proof of American's acquisition of Northwestern's common stock at arm's length and for value, of the reorganization of Northwestern in 1936, and of the value of the property of Northwestern (i) at the time of American's acquisition, (ii) at the time of the reorganization, and (iii) at the time of hearing, which was offered on behalf of both petitioners in the second hearing, was not before the lower court on the first review. The values so offered to be proved fully supported Northwestern's capital structure, including its common stock. And there is not a single

syllable in the lower court's first opinion which so much as hints at either the reclassification or the disposition of "the common-stock item." *Thus the court below disregarded this vitally important issue on the first review, but regarded it as previously decided when it was raised on the second review.*

Petitioners' contentions that the Commission's order is a judicial determination, and that the Commission has arrogated judicial functions, elicited this statement in the opinion of the court below (R. 1238):

> "The Commission was authorized to do what it did, regardless of whether the effects mentioned by petitioner result. The only argument which can be made is that such statute is void—a contention not made here."

On the contrary, argument that the statute (Sec. 301(a) of the Act) under consideration was void, if so interpreted as to permit the Commission to arrogate judicial authority, was implicit in petitioners' contentions. For they urged with some vigor, both before the Commission and before the court below, that the statute does not empower the Commission to enter such an order of disposition, that the order would take the property of the petitioners without due process of law and in violation of Article III of, and both the Fifth and Tenth Amendments to, the Constitution and that, therefore, the order was without authority of law. The question as to whether, in order to avoid the conclusion of unconstitutionality, the statute should be construed to deny the power to enter the order of disposition thus was clearly presented.

Since a determination of this question was necessary, the court below was obligated to adopt a construction of

the statute which would not render it unconstitutional. As Mr. Justice Roberts, speaking for this Court, said in *Porter* v. *Investors Syndicate*, 286 U. S. 461, 470, "We are persuaded to this view for the reason that it supports the constitutionality of the act, and we are bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality."

Equally pertinent is the decision of this Court in *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, in which it was observed (p. 546):

> "And, even aside from the consideration just adverted to, it is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority."

The lower court, obviously having mistaken the issues, has denied petitioners an opportunity to be heard and their day in court with respect to these significant and properly presented questions. *Lutcher & Moore Lumber Company et al.* v. *William H. Knight et al.*, 217 U. S. 257; *A. M. Anderson, Receiver*, v. *Atherton*, 302 U. S. 643; *Guaranty Trust Co. of New York* v. *United States*, 304 U. S. 126.

The Commission's brief in opposition to the petition for certiorari in this case asserts that petitioners had attempted to argue all the questions which would be open

if the Commission's original order were before this Court and relies primarily upon the plea of *res judicata*. That assertion may be repeated. But the Commission cannot enter such a plea in this proceeding. Interpreting *its own order* before the lower court, it framed the issues to exclude the question of disposition from the scope of the lower court's first judgment. It presented and relied upon the claim that "the question of the disposition of $3,500,000, therefore, is not properly before the court," and it is estopped from asserting that the judgment of the lower court on the first review determined that said amount of $3,500,000 must be written out of the accounts of Northwestern (See our Reply Brief in connection with Petition for Certiorari, pp. 3 to 8).

Conclusion.

We respectfully submit that the Commission's order attempts to establish the supremacy of its accounting jurisdiction over law by asserting the primacy of cost over value for all purposes and in all circumstances, and that, for the reasons set forth in the foregoing points, such order is not "within the ambit of [the Commission's] statutory authority" and that, "as applied to the facts before it and viewed in its entirety", it violates constitutional guarantees

and produces an "arbitrary result", necessitating its judicial repudiation. Thus the decree of the Circuit Court of Appeals affirming said order clearly was erroneous.

Respectfully submitted,

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Appendix A.

Excerpts from Federal Power Act (16 U. S. C. A., Secs. 807, *et seq.*).

SEC. 14. [*As amended August 26, 1935.*] Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings

upon payment of just compensation is hereby expressly reserved.

SEC. 19.. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from

such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or

locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

SEC. 23. [*As amended August 26, 1935.*] (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided*, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality

intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

SEC. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities

for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 204. (a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise, in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds

that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after this Part takes effect.

(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit or contract.

(e) Subsection (a) shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue,

renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State Commission.

(g) Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under section 7 of the Securities Act of 1933 and sections 12 and 13 of the Securities and Exchange Act of 1934.

SEC. 205. (a) All rates and charges made, demanded or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Com-

mission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or regulate such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classifica-

tion, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 207. Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be

furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

SEC. 208. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

SEC. 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however*, That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays

and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and public utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(c) The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, insofar as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission.

SEC. 309. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed

with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the

United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Excerpts from Remington's Rev. Stats. of Washington, Sec. 3803-24 (1939 Supp.).

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"2. Amounts of surplus arising from an unrealized appreciation or revaluation of fixed assets shall be shown on the books of the corporation as a separate item apart from surplus profits or paid-in surplus.

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"4. No corporation shall pay dividends,

a. in cash or property, except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter the amount of its capital stock, after deducting from such aggregate of its assets the amount by which such aggregate was increased by unrealized appreciation in value or revaluation of fixed assets;

b. in shares of the corporation, except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter the amount of its capital stock.

"5. Cash dividends shall not be paid out of surplus due to or arising from,

a. any profit on treasury shares before resale; or

b. any unrealized profits due to increase in valuation of inventories before sale; or

c. the unaccrued portion of unrealized profits on notes, bonds, or obligations for the payment of money purchased or acquired at a discount unless such notes, bonds or obligations are readily marketable, in which case they may be taken at their actual market value; or

d. the unaccrued or unearned portion of any unrealized profit in any form whatever, whether in form of notes, bonds, obligations for the payment of money, installment sales, credits or otherwise.